REGIONAL CENTRE FOR ARBITRATION

v.

OOI BENG CHOO & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
NIK HASHIM J
[ORIGINATING SUMMONS NO: R3-25-29-95]
19 NOVEMBER 1997

ADMINISTRATIVE LAW: *Remedies - Certiorari - Adducing of fresh evidence - Principles applicable*

CIVIL PROCEDURE: *Appeal - Adducing of fresh evidence - Judicial review proceedings - Issue of jurisdiction - Discretion of court - Principles applicable*

CIVIL PROCEDURE: *Jurisdiction - Immunity - Regional arbitration centre*

EVIDENCE: *Fresh or further evidence - Admission of, in appeal - Judicial review proceedings - Principles applicable*

CIVIL PROCEDURE: *Affidavit - Cross-examination of deponent - When permitted - Discretion of court - Principles applicable*

The respondent was a research officer employed by the plaintiff until her services were terminated on 23 December 1992. She caused the matter to be referred to the Industrial Court for adjudication under s. 20 of the Industrial Relations Act 1967. At the outset of the proceedings, the applicant raised a preliminary objection about the Industrial Court's jurisdiction to hear the reference on the basis that the applicant was immune from all legal suits and process. The objection was overruled and the Industrial Court handed down its award on 16 December 1994. The applicant applied by way of motion for an order of *certiorari* to quash the award.

Pending hearing of the substantive motion, the applicant applied for leave to adduce fresh evidence in the form of an agreement between the Asian African Legal Consultative Committee ('AALCC') and the Government of Malaysia dated 29 February 1996 ('the agreement') through an affidavit of the AALCC director ('the deponent') affirmed on 27 March 1996. The agreement contained, *inter alia,* provisions relating to the privileges and immunities of the applicant 'as may be necessary for the purpose of executing its functions including immunity from suit and legal process' and was expressed to be effective retrospectively from 1 January 1992.

Counsel for the applicant argued that the agreement was relevant to the question of the Industrial Court's jurisdiction and was thus admissible as fresh evidence. Counsel for the respondent, however, argued that since the agreement was made only after the award was handed down, it could not be admitted as fresh evidence as the court had to confine itself only to the material that was before the Industrial Court. The respondent also applied to cross-examine the deponent on her affidavit in support of the application to adduce fresh evidence. The main issue before the court was whether the ambit of *certiorari* proceedings allows for the introduction of fresh evidence.

Held:

[1] Order 53 of the Rules of the High Court which governs the orders of *mandamus,* prohibition and *certiorari* does not provide for fresh evidence to be admitted. Order 53 r. 3(2) allows further affidavits to be received only where new matters arise out of the affidavit of any party. Rule 3(2) was not applicable in this case as the affidavit was not sought to be introduced in response to any previous affidavit but was fresh evidence altogether.

[2] In ordinary cases of appeals after a trial on the merits, fresh evidence cannot be admitted unless three conditions are satisfied, namely that the evidence could not be obtained with reasonable diligence for use at the trial, it would have had an important influence on the result of the case although it need not have been decisive, and it must be believable although not incontrovertible.

[3] In judicial review proceedings, however, the court has a wider discretion to admit fresh evidence. While it is guided by the approach in ordinary cases of appeals, it has a discretion to depart from it if the wider interests of justice so require.

[4] The categories of fresh evidence admissible on judicial review are: (i) evidence showing what material was before the decision-maker when he took the decision; (ii) where the issue is one of jurisdictional fact for the court to decide; and (iii) where the evidence is intended to support an allegation of bad faith or procedural error of the public body in reaching its decision.

[5] The agreement was relevant and necessary for the purpose of the hearing of the substantive motion as it related to the issue of the applicant's legal immunity during the period of the respondent's dismissal. The issue of the applicant's immunity was a question of law for the court to decide, and the agreement was therefore admissible as fresh evidence under the court's inherent jurisdiction provided in O. 92 r. 4 of the RHC.

[6] The court retains the absolute discretion whether or not to allow cross-examination of a deponent on his/her affidavit. Generally cross-examination would not be allowed unless there is a question of fact to be tried which requires *viva voce* testimony tested by cross-examination or where there are special circumstances or where it is necessary to do justice between the parties.

[7] The issue of immunity of the applicant is a question of law. There were no disputed questions of fact which required affidavit evidence to be tested *viva voce* as the issue of immunity could be decided without reference to any cross-examination. The deponent's views were irrelevant to the issue and there were no special circumstances. The respondent's application was therefore dismissed.

[Applicant's application allowed; respondent's application dismissed.]

Cases referred to:

Arab-Malaysian Merchant Bank Bhd v. City Properties [1992] 4 CLJ 2123 ***(refd)***
George v. Secretary of State for Environment & Anor [1979] 38 P & CR 609 ***(cit)***
Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & Ors & Anor Application [1994] 2 MLJ 789 ***(refd)***
Ladd v. Marshall [1954] 3 All ER 745 ***(dist)***
Lau Foo San v. Government of Malaysia [1970] 2 MLJ 71 ***(not foll)***
Momin Ali v. Secretary of State for the Home Department [1984] 1 WLR 663 ***(refd)***
R v. Secretary of State for Environment, ex p Powis [1981] 1 WLR 580 ***(foll)***
R v. West Sussex Quarter Sessions ex-p Albert & Maud Johnson Trust Ltd & Ors [1974] QB 24 ***(dist)***
Re Smith & Fawcett Ltd [1942] 1 Ch 304 ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, s. 20
Rules of the High Court 1980, O. 53 r. 3(2), O. 92 r. 4

Other source referred to:

Judicial Remedies in Public Law, Clive Lewis, 1992, p 262
White Book – The Supreme Court Practice 1993, vol 1, part 1

For the applicant - Romesh Abraham (CM Teng with him); M/s Shook Lin & Bok
For the respondent - P Gananathan; M/s Logan Sabapathy & Co

Reported by Anne Khoo

JUDGMENT

Nik Hashim J:

Ooi Beng Choo, the respondent in this case, was a research officer with the Regional Centre for Arbitration, Kuala Lumpur (the applicant) until her services were terminated on 23 December 1992. The respondent claiming that such termination was wrongful and without just cause or excuse, caused the matter to be referred to the Industrial Court for adjudication. At the outset of the proceedings before the Industrial Court on 11 November 1994, the applicant raised a preliminary objection as to the jurisdiction of the Industrial Court to hear the reference in that the applicant was entitled to immunity from all legal suits and process including any action brought under s. 20 of the Industrial Relations Act 1967.

The Industrial Court, however, in its award dated 16 December 1994, overruled the objection and held that it had the jurisdiction to hear the reference. Pending the hearing of the substantive motion for an order of *certiorari* to quash the award of the Industrial Court, the applicant in the meanwhile filed an application seeking leave to adduce fresh evidence in the form of an agreement (the agreement) between the Asian African Legal Consultative Committee ("AALCC") and the Government of Malaysia dated 29 February 1996 through the affidavit affirmed by the AALCC director Lim Phaik Gan on 27 March 1996. The agreement, amongst other things, contained provisions relating to privileges and immunities of the applicant as stated in art. III cl. 1 thereof which reads as follows:

> The Centre shall enjoy such privileges and immunities as may be necessary for the purpose of executing its functions including immunity from suit and legal process.

This agreement is said to be effective from 1 January 1992 and hence, would cover the material period when the respondent's services were terminated on 23 December 1992 by the applicant.

Encik Romesh Abraham for the applicant submitted that the agreement is relevant to the question of the Industrial Court's jurisdiction as it specifically refers and sets out the basis upon which the applicant was set up since its inception in 1981 and the immunity it enjoys by reason thereof and cited an English case of *R. v. Secretary of State for Environment, Ex-parte Powis* [1981] 1 WLR 580 in support.

Learned counsel for the respondent, Encik P. Gananathan, on the other hand, argued that since the agreement was available only after the award was granted, the introduction of fresh evidence in *certiorari* proceeding cannot be

allowed. According to him, this court can only confine itself with the material that was placed before the Industrial Court and quoted *Judicial Remedies in Public Law* by Clive Lewis at p. 262 and the case of *R. v. West Sussex Quarter Sessions Ex-Parte Albert and Maud Johnson Trust Ltd. and Others* [1974] QB 24 and *Ladd v. Marshall* [1954] 3 All ER 745 in support for the above propositions.

Thus, the issue before the court is whether the ambit of *certiorari* proceedings allows for the introduction of fresh evidence.

It is significant to note that O. 53 of the Rules of the High Court 1980 (RHC) which governs application for order of *mandamus,* prohibition or *certiorari* does not provide for fresh evidence to be admitted. However, learned counsel for the applicant urged the court to construe the provisions of O. 53 r. 3(2) broadly so as to include the situation where fresh evidence may be introduced. Rule 3(2) of O. 53 of the RHC states:

> The court or judge may on the hearing of the motion or summons allow the said statement to be amended, and **may allow further affidavits to be used if they deal with new matter arising out of any affidavit of any other party to the application,** and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he must give notice of his intention and of any proposed amendment of his statement to every other party, and must supply copies of such further affidavits.
> (Emphasis added)

A perusal of the above rule would indicate that the reception of further affidavits under its provision relates only to new matters which arise out of any affidavit of any party. Since the applicant's affidavit with the agreement as an exhibit is not being sought to be introduced in response to any previous affidavit but fresh evidence altogether, therefore, I hold that O. 53 r. 3(2) is not applicable for the admission of such fresh evidence. However, O. 53 does not expressly prohibit the introduction of fresh evidence for the purposes of judicial review proceedings under O. 53 of the RHC.

In the absence of local authority, perhaps it is useful to examine the English laws on the issue before the court. Normally in the case of appeals against a decision after a trial on the merits, fresh evidence cannot be admitted before an appellate court unless the three conditions laid down in *Ladd v. Marshall* [1954] 3 All ER 745 (which was adopted by the Federal Court in *Lau Foo San v. Government of Malaysia* [1970] 2 MLJ 71), are satisfied. The conditions are:

> (i) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

(ii) the evidence must be such that if given, it would probably have an important influence on the result of the case, although it need not be decisive; and

(iii) the evidence must be such as is presumably to be believed, or in other words, it must be apparently creditable, although it need not be incontrovertible.

In judicial review proceedings, however, the decision in *Ladd v. Marshall* does not, as such, apply (*Momin Ali v. Secretary of State for the Home Department* [1984] 1 WLR 663 CA). The English Court of Appeal has a wider discretion to admit fresh evidence in judicial review cases than exists in ordinary civil litigation. Nevertheless, in the interests of achieving finality in litigation, the said Court of Appeal applies in judicial review proceedings a similar approach to that in *Ladd v. Marshall,* subject to the court's discretion to depart from it if the wider interests of justice so require (see commentary in the *White Book – The Supreme Court Practice* 1993 Vol. 1, Part 1 under the headnote: "Fresh evidence in judicial proceedings" at p. 865).

The learned author Clive Lewis under the headnote "Fresh Evidence" in *Judicial Remedies in Public Law* (1992) said at p. 262:

> On an application for judicial review, a court is concerned with reviewing the decision of a public body to ensure that the decision is not *ultra vires.* The courts will usually only look at the material before the decision-maker at the time that he took the decision in order to determine whether he has made a reviewable error. The courts cannot consider fresh evidence, that is evidence which if, put before the decision-maker, might have influenced his decision; the court cannot, therefore, admit in evidence material that became available after the decision in order to determine whether the decision-maker erred in coming to his decision. Nor can the courts have regard to material which existed before the decision was taken and which, if considered by the decision-maker, might have influenced his decision. Thus, the courts could not consider fresh evidence as to the existence of a right of way in order to undermine a decision of a public body that no such right of way existed.
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> The only categories of fresh evidence admissible on judicial review are as follows. The court may receive evidence showing what material was before a decision-maker when he took the decision. The court may also receive evidence where the issue is one of jurisdictional fact for the court to decide or where the evidence is intended to support an allegation of bad faith or of procedural error by the public body in reaching its decision.

In the case of *Ex-Parte Powis (supra)* the English Court of Appeal at 595 said:

> Finally there was an application on behalf of the tenant to admit fresh evidence which the Divisional Court had refused to admit. Like the Divisional Court we considered the evidence *de bene esse*. What are the principles on which fresh evidence should be admitted on judicial review? They are (1) that the court can receive evidence to show what material was before the minister or inferior tribunal: *Ashbridge Investments Ltd. v. Minister of Housing and Local Government* [1965] 1 WLR 1320, 1327, per Lord Denning MR; (2) where the jurisdiction of the minister or inferior tribunal depends on a question of fact or where the question is whether essential procedural requirements were observed, the court may receive and consider additional evidence to determine the jurisdictional fact or procedural error: see *de Smith's Judicial Review of Administrative Action* 4th ed. (1980), at pp. 140, 141 and cases there cited; and (3) where the proceedings are tainted by misconduct on the part of the minister or member of the inferior tribunal or the parties before it. Examples of such misconduct are bias by the decision making body, or fraud or perjury by a party. In each case fresh evidence is admissible to prove the particular misconduct alleged: see *Reg. v. West Sussex Quarter Sessions, Ex-parte Albert and Maud Johnson Trust Ltd.* [1974] QB 24, 39, 43 per Orr and Lawton LJJ.

In the case of *R v. West Sussex Quarter Sessions (supra),* the land owners therein had applied by way of *certiorari* to quash the decision of quarter sessions which found on the evidence that a certain path was a public footpath. The land owners purported to adduce fresh evidence which they argued would result in a *certiorari* being granted. The Queen's Bench Division unanimously held that *certiorari* would not lie to quash a decision of an inferior tribunal merely on the grounds that fresh evidence had come to light since the hearing. At arriving at this decision, the Queen's Bench Division defined the ambit and limits of *certiorari* proceedings and found that apart from circumstances such as perjured testimony, fraud or forgery found to exist thereafter in proceedings before the inferior tribunal, the court exercising powers of judicial review cannot receive fresh evidence merely because it has come to light after the hearing. On appeal the Court of Appeal by a majority dismissed the appeal and found that the evidence sought to be adduced, in the absence of vitiating factors such as fraud or forgery, could not be so adduced as it did not fall within the limits of prerogative writs.

In the *West Sussex's* case, the fresh evidence sought to be introduced did not concern a jurisdictional fact but simply evidence pertaining to the merit of the claim, ie, the question of whether a particular path was a public path or not. Whereas, in the present case, the applicant sought to admit fresh evidence regarding jurisdictional fact, which is one of the exceptions to the established principle for the reception of fresh evidence in judicial review (see *Lewis and Powis (supra.)*). In this regard, I respectfully agree with the English law and would adopt and apply the same to the present case. Therefore, I hold that fresh evidence is admissible to determine jurisdictional fact in *certiorari* proceeding.

The agreement was not available when the Industrial Court heard the preliminary objection in December 1994. The agreement was only executed on 29 February 1996. As such, it could not be obtained earlier. Therefore, the question to exercise reasonable diligence in obtaining the agreement earlier does not arise. Since the objection in the Industrial Court relates to the issue of immunity of the applicant over the relevant period when the respondent was dismissed on 23 December 1992, which period appears to have covered by the agreement, I find that the agreement is relevant and indeed necessary for the purpose of the hearing of the substantive motion for *certiorari*. The issue of the immunity of the applicant is a question of law for the court to decide, and thus, with the agreement before it, the court would be in a better position to judge on the issue of immunity of the applicant and hence the jurisdiction of the Industrial Court. The agreement, if admitted, would probably have an important influence on the outcome of the case, although it might not be decisive. Accordingly, in order to do justice between the parties, the court would exercise its inherent power under O. 92 r. 4 of the RHC to admit the agreement as fresh evidence on jurisdictional fact at the hearing of the substantive *certiorari* proceeding. In the result, I allow the application to introduce the agreement as fresh evidence in encl. (7) with costs to be borne by the applicant.

That however, is not the end of the matter. The respondent has filed an application in encl. (12) praying for an order to cross-examine the deponent on the affidavit with regard to the agreement which was admitted as fresh evidence. The deponent in this case is the director of the centre.

It is settled law that the court retains an absolute discretion whether or not to allow to cross-examine a deponent on his affidavit. Generally, cross-examination will not be allowed unless there is a question of fact to be tried which requires *viva voce* testimony tested by cross-examination (see *Arab-Malaysian Merchant Bank Bhd. v. City Properties* [1992] 4 CLJ 2123), or where there are "special circumstances" *Re: Smith & Fawcett Ltd.* [1942] 1 Ch. 304. In the sphere of judicial review proceedings, it is a matter for the discretion of the court; it should not be allowed except where the court believes that it is necessary in order that justice may be done between the parties. (Per Lord Denning MR in *George v. Secretary of State for Environment and Another* [1979] 38 P & CR 609).

It is the contention of the respondent that the agreement would not assist the court on the issue of immunity as the agreement being retrospective in nature and procured well after the award was delivered and therefore requires an explanation by the deponent as to the manner in which it was obtained, and cited *Kumagai Gumi Co. Ltd. v. Zenecon-Kumagai Sdn. Bhd. & Ors. and Another Application* [1994] 2 MLJ 789 in support. In *Kumagai* it was held that:

whether cross-examination should be addressed in a matter like this (winding-up petition) was within the discretion of the court and in this case, the approach of the court should be to examine the contemporaneous documents and the conduct of the parties. Here, the matter could be decided without reference to any cross-examination since there was abundant documentary evidence that was not disputed which would enable any court to arrive at a decision on the matter.

In the present case before me, the issue of immunity of the applicant is a question of law. The court has to decide the merit of the provisions of the agreement in the substantive motion. The agreement is an official document entered between the Government of Malaysia and the AALCC on the status of the applicant as an international organisation. As far as the agreement is concerned, there are no disputed question of facts which require affidavit evidence to be tested *viva voce*. In my view, the issue of immunity could be decided without reference to any cross-examination. Neither is the deponent's personal views relevant nor decisive on the legal question to be decided. In the result, I find that the respondent's affidavit in support of the application to cross-examine the deponent is devoid of any good grounds. Neither there are "special circumstances" in this case. Accordingly, I hold that the respondent's application for cross-examination in encl. (12) has no merit whatsoever, and hence the application is dismissed. However, under the circumstances of this application, I make no order as to costs.

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